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National Security Interests vs. The First Amendment: Haig v. Agee

Joan R. M. Bullock
Florida A&M University College of Law, joan.bullock@famu.edu

NATIONAL SECURITY INTERESTS VS. THE FIRST AMENDMENT: *HAIG V. AGEE*

I. INTRODUCTION

IN *Haig v. Agee*,[1] the United States Supreme Court held that the Secretary of State has the authority to revoke a passport when the bearer's activities abroad "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[2] The Secretary of State had revoked the passport of Phillip Agee, who was declaring a campaign to abolish his former employer, the Central Intelligence Agency (CIA). Although the Court made only a cursory reference to Agee's first amendment rights in making its decision, the *Agee* case raises important first amendment questions regarding the Secretary's broad discretion to deny or revoke passports.

In the course of its opinion, the Supreme Court addressed the issue of whether the Passport Act[3] grants broad rule-making authority to the Executive Branch to defend national security. Using *Kent v. Dulles*[4] and *Zemel v. Rusk*[5] as precedents, the Court held that the policy of the challenged regulation[6] which were made pursuant to the Passport Act was "sufficiently substantial and consistent"[7] to manifest congressional approval of the Secretary's actions. Both *Kent* and *Zemel* stand for the proposition that absent express congressional approval, a narrow construction of the Passport Act, based on longstanding administrative practice must be applied.

However, in *Agee*, the Supreme Court relied upon certain administrative policies, rather than a longstanding administrative practice, to find sufficient congressional approval. This deviation of the Court hinders the advancement of protected individual freedoms since it

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1. 453 U.S. 280 (1981).

2. *Id.* at 287.

3. 22 U.S.C. § 211(a) (1976).

4. 357 U.S. 116 (1958).

5. 381 U.S. 1 (1965).

6. 22 C.F.R. § 51.70(b)(4) (1980) (grounds by which the Secretary may deny a passport) and 22 C.F.R. § 51.71(a) (1980) (circumstances where the Secretary may revoke, restrict, or limit a passport).

7. Zemel v. Rusk, 381 U.S. 1, 12 (1965).

permits infringement of personal liberty without requiring the Secretary to first satisfy procedural safeguards.[8] No standards are applicable to the Secretary of State to determine which activities of a citizen threaten national security. Therefore, the Court's sanction of the Secretary's actions in *Agee* may open the door to punitive government actions through revoking the passports of dissidents, expatriates, or any national who may wish to voice an opinion in an international setting.

Since *Agee* raises these questions about the future handling of passports, this note will examine the implications of *Agee* as a standard in resolving conflicts between national security and first amendment rights of the individual. Initial discussion will center on the development of various tests used to protect first amendment rights together with the development of government measures used to preserve national security. In light of these developments, this note will delineate the Court's digression in *Agee* from past precedents in order to "protect" national security and suggest that the Court could have reached the same result, yet provide greater protection for the constitutionally protected right to travel, had it thoroughly considered Agee's first amendment rights.

II. Background: The First Amendment and National Security

A. *The First Amendment*

In the area of first amendment protection, no single theory has been used in analyzing free speech.[9] The various characteristics of speech prevent application of any one method of constitutional analysis. To provide uniformity, the Court has classified expression into three categories: expression deserving full constitutional protection;[10] expression deserving minimal protection;[11] and, expression

8. Sanction of broadly framed or applied restrictions of the right to travel with no longstanding administrative practice present to show legislative approval removes much of the constitutional protection accorded the right to travel.

9. *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 286-88 (1981).

10. Here, "full protection" should not be equated with absolute protection. Instead, it should be viewed in the context of the first amendment providing a maximum level of protection for certain types of speech. "For if the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .'" L. Tribe, American Constitutional Law § 12-2 at 581 (1978). Expression of religious beliefs is one area where full protection has been invoked. Govern-

deserving no protection.[12] In order to accomodate the diverse characteristics of expression, the Supreme Court has set different standards to determine whether expression has been unconstitutionally suppressed. The evolution of these standards—from the clear and present danger test to the current balancing test—shows an increasing awareness of the significance of free expression by the Supreme Court.

1. The Clear and Present Danger Test

The clear and present danger test was first enunciated in *Schenck v. United States*[13] by Justice Holmes. Formulated to reach speech attacking American involvement in the First World War,[14] the test depended on "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[15]

The clear and present danger test was advanced during an era of judicial hostility towards free expression.[16] Nonetheless, Holmes' test embodied the notion that government can only control the time and location and not the content of an individual's expression.[17]

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ment cannot penalize or discriminate against those who hold religious views abhorrent to it. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

11. In Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), the Court distinguished "mere advocacy" in the abstract from advocacy which is likely to incite or produce such action. *Id.* at 447-49. Only the former is protected by the first amendment.

12. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Court held that obscene material had no protection under the first amendment. *See also* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

13. 249 U.S. 47 (1919) (where the Court affirmed a conviction under the Espionage Act, ch. 30, 40 Stat. 217 (1917) for conspiring to distribute a circular urging opposition to the selective draft).

14. The clear and present danger test arose in the area of seditious speech. It was applied in cases where the restriction at issue was a direct prohibition of expression by criminal or similar sanctions. *E.g.*, Pierce v. United States, 252 U.S. 239 (1920).

15. Schenck v. United States, 249 U.S. at 52 (1919).

16. Although the clear and present danger test allowed more first amendment protection than its predecessor, the bad tendency doctrine (restricting expression which had a tendency or which the legislature could reasonably believe would lead to substantial evil, Gitlow v. New York, 268 U.S. 652, 670-71 (1925)), the Court's decision reflected the nationwide fear of communist infiltration and domination. J. LIEBERMAN, FREE SPEECH, FREE PRESS, AND THE LAW 35 (1980).

17. As Holmes stated, "We admit that in many places and in ordinary times the

Since the effect of the clear and present danger test was to allow more protection to expression, the majority of the Supreme Court refused to apply it on a consistent basis.[18]

The clear and present danger test was later modified in *Brandenburg v. Ohio.*[19] The new formulation retained the requirement that the danger be clear and present and added the elements of imminency and incitement to harm. Since the Court's enunciation of the modified test in *Brandenburg,* few cases have subsequently utilized this rule[20] as a test for limiting free expression.[21] In character-

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defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." Schenck v. United States, 249 U.S. at 52.

18. Because of the "red scare," views denouncing "the American Way" were considered to be outside the area of protected speech. Many members of the Court believed the clear and present danger test overly restricted the government's ability to suppress seditious speech; thus, the Court utilized the "bad tendency doctrine," see *supra,* note 16, to affirm convictions of individuals posing a substantial danger to the state, *e.g.,* Gitlow v. New York, 268 U.S. at 669-70. Full acceptance of Holmes' danger test arose in Herndon v. Lowry, 301 U.S. 242 (1937) (reversal of a conviction under a Georgia statute making it a crime to attempt to incite insurrection). The test was then expanded to determine the validity of government suppression of free speech in other contexts. Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949) (speaker arousing and audience causing a breach of the peace); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941) (contempt of court); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating statute making compulsory flag salute for public school children); Cantwell v. Connecticut, 310 U.S. 296 (1940) (disturbing the peace); Thornhill v. Alabama, 310 U.S. 88 (1940) (peaceful picketing).

19. 395 U.S. 444 (1969). "[T]he constitutional guarantee of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." *Id.* at 447. For a more detailed development of the clear and present danger test, see *generally* Note, *The Clear and Present Danger Standard: Its Present Viability,* 6 U. RICH. L. REV. 93, 94-109 (1971); Annot., 38 L.ED.2d 835 (1974).

20. For a more indepth discussion of the decline of the clear and present danger rule, see Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg *and Beyond,* 1969 SUP. CT. REV. 41.

21. Healy v. James, 408 U.S. 169 (1972). (*Healy* reversed a university's denial to give official recognition as a campus organization to a student group whose political and social views were antagonistic to the schools' view. "The critical line . . . drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' "). *Id.* at 188 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). Many recent cases have made reference to the clear and present danger rule without invoking it as a test for resolving first amendment issues. Central Hudson Gas & Elec. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 575-81 (1980)

izing the test, the Court recently stated that the clear and present danger test is not a technical legal doctrine or formula. Rather, the rule permits the Court to examine the imminence and magnitude of the danger said to flow from a particular expression and then balance the character of the evil against the need for free expression.[22]

2. The Balancing Test

Beginning in *American Communications Association v. Douds*,[23] the Court adopted a balancing test for determining whether an individual's constitutional rights have been violated. The balancing test enables the Court to balance the individual and societal interests for freedom of expression with the societal interest for freedom of expression with the societal interest advanced by the restrictive regulation.[24] Since the rights of the individual rarely are substantial enough to require a court's dismissal of a valid government interest, the balancing test tends to favor the government rather than the individual.[25] Conversely, the danger test, with the requirement that the rights of the individual cannot be suppressed absent a showing of clear and present danger, tends to favor the rights of the individual rather the government.[26]

(Brennan, J. and Stevens, J., concurring); Greer, Commander, Fort Dix Military Reservation v. Spock, 424 U.S. 828, 840 (1976) (prohibition of handing out radical political leaflets at military post).

22. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-43 (1978). "The question as to the kind of danger which must be 'clear and present' to justify an interference with the right of free speech cannot be answered in the abstract. In each situation, it is another and different kind of danger contemplated by the rule." Annot., 38 L. Ed. 2d 835, 840 (1974). The test has been applied in the following cases: Eflbrandt v. Russell, 384 U.S. 11 (1966) (threat to a substantial state interest): Feiner v. New York, 340 U.S. 315 (1951) (incitement to riot); Dennis v. United States, 341 U.S. 494 (1951) (advocacy of the overthrow of government); *see also* cases cited *supra* note 18. The clear and present danger test was held not applicable in the following cases: Cox v. Louisiana, 379 U.S. 559 (1965) (demonstrating in an inappropriate place); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (statutes regulating the conduct of labor union affairs).

23. 339 U.S. 382 (1950).

24. T. Emerson, Toward a General Theory of the First Amendment 53-56 (1966).

25. For example, rarely will an individual's constitutional right be found so substantial as to subordinate a valid government interest regarding national security. Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 467-68 nn. 18-19 (1969).

26. Note, *The Clear and Present Danger Standard: Its Present Viability*, 6 U.

The balancing test has replaced the clear and present danger test as the dominant theory in resolving first amendment issues.[27] It has been applied to "speech plus" regulation,[28] regulation for speech reasons,[29] regulation of future conduct,[30] regulation of special groups,[31] and forced disclosure of personal beliefs.[32]

When utilizing the balancing test, the Court evaluates certain factors: the government interest, the method used to achieve its interests, the mode of speech regulated, and the location of the speech.[33] Thus, the main thrust behind the balancing test is that a

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RICH. L. REV. at 106 n.77 (1971).

27. *Id.* at 111.

28. An articulation of the test for "speech plus" cases is (1) that the government regulation must be sufficiently justified and within constitutional power; (2) that it further an important or substantial governmental interest; and (3) if the regulation purports to restrict action but speech is incidentally affected, the incidental restriction must be no more than necessary to further that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968) (symbolic speech). Other "speech plus" cases include: Bigelow v. Virginia, 421 U.S. 809 (1975) (commercial speech); Cox v. Louisiana, 379 U.S. 536 (1965) (breach of the peace); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing).

29. Regulation for speech reasons differs from "speech plus" regulation since the former seeks to directly control speech whereas the latter seeks to control action which may result in an incidental restriction on speech. An example of a case involving a regulation for speech reasons is Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (where Red Lion challenged regulations requiring the coverage of opposing views and the opportunity for a person subject to a personal attack to respond).

30. An example of this type is a regulation aimed at preventing harm to government operations by prohibiting persons with certain beliefs from being employed. *E.g.*, Adler v. Bd. of Educ., 342 U.S. 485 (1952) (prohibiting teachers who advocated or taught the overthrow of the American government by force or violence from working in New York school system); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (prohibiting members of the Communist Party from being labor union officers).

31. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1978) (upheld the Hatch Act, 18 U.S.C. § 61(h) (Supp. V 1940) which prohibits certain government employees from taking "active part in political management or political campaigns"); Parker v. Levy, 417 U.S. 733 (1974) (less first amendment protection given to military personnel); Procunier v. Martinez, 416 U.S. 396 (1974) (upholding diminished legal status of prisoner).

32. Sweezy v. New Hampshire, 354 U.S. 234 (1957) (upholding a witness' right not to answer questions concerning his lectures to the Progressive Party); Watkins v. United States, 354 U.S. 178 (1957). "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." 354 U.S. at 198.

33. Niemotoko v. Maryland, 340 U.S. 268, 282 (1951) *quoted in* M. FORKOSCH, CONSTITUTIONAL LAW 400 at 440 (2d ed. 1969).

mere showing of some legitimate government interest is insufficient; the gain sought by the government regulation must outweigh the loss of protected rights to the individual.[34]

a. Doctrine of Less Drastic Means

In applying the balancing test, the Court has frequently utilized the doctrine of "less drastic means" or "least restrictive alternatives."[35] This doctrine requires the government to choose the measure which least interferes with individual liberty when it has available a variety of equally effective means to a given end.[36] The doctrine of less drastic means provides more protection for affected first amendment freedoms competing against substantial government interests.[37] Nonetheless, this doctrine has been found not to be applicable to all first amendment cases. If the government measure is one that is forbidden,[38] the end sought insubstantial[39] or beyond the government's power,[40] or if the court finds the affected expression is protected thus leaving only the task of deciding that an abridgment has occurred,[41] the "less drastic means" concept will not

34. Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976) (commercial speech); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 30708 (1964) (holding that Alabama could not force disclosure of NAACP membership list); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (making employment of teachers conditional upon their filing affidavits of every organization they belonged to or regularly contributed to within five years violated their associational freedom); Talley v. California, 362 U.S. 60 (1960) (ordinance restricting distribution of anonymous handbills void on its face).

35. *E.g.*, United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

36. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

37. "A scale which puts in one pan the public interest in some legitimate end of government—national security, civil peace, or preservation of the machinery of justice—rather than the interest in a particular means to that end will rarely tip in favor of competing values." *Id.* at 467 (footnote omitted).

38. *E.g.*, United States v. Brown, 381 U.S. 437 (1965) (bill of attainder).

39. *E.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (interest of State in requiring all public school teachers to be loyal to the government insubstantial in relation to the inhibitory effect on expression).

40. *E.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (State cannot limit jury service to all white male persons over age 18 in murder trial of a black man. Such a law is violative of the equal protection clause of the fourteenth amendment).

41. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (advocacy of action in abstract constitutionally protected). Further clarification of the less drastic means test being inapplicable to all first amendment cases can be found in Note, *supra* note 36

be applied.[42]

b. The Overbreadth and Vagueness Doctrines

Closely related to the "less drastic means" element of the balancing test are the overbreadth and void for vagueness doctrines. In both, the law is "ordinarily regarded as invalid 'on its face' instead of as 'applied' and can in most cases be rewritten more clearly or more narrowly so as to cure the reasons for its invalidation"[43] thereby reflecting a less drastic result.[44]

Although the doctrines of overbreadth and vagueness are sometimes used interchangeably, the two should not be confused. The overbreadth doctrine applies to legislation whose reach has the potential to invade protected freedoms. On the other hand, the vagueness doctrine, which rests on the due process clauses of the fifth and fourteenth amendments, applies to legislation which is lacking in clarity.[45] However, in the context of the first amendment, the two doctrines are not entirely distinct.[46] It is possible for a regulation to be both overbroad and vague. Whenever an overbroad regulation covering first amendment activities does not have adequate standards to guide its application, the result is a regulation that suffers from due process vagueness.[47] Determination of whether the regulation is overbroad depends upon the factual circumstances in which the regulation is applied. Without sufficient standards to guide officials and reviewing courts, no precise category of privileged conduct can be formulated that would fall outside the reach of the regulation. Since an enforcer of the regulation would make decisions based

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at 465-66.

42. An articulation of the concept appeared in Shelton v. Tucker, 364 U.S. 479 (1960). In that case, it was stated that the legislative purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488 (footnotes omitted).

43. P. KAUPER AND F. BEYTAGH, CONSTITUTIONAL LAW 1192 (5th ed. 1980).

44. For a critical analysis of the less drastic means concept as a test for overbreadth, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 915-18 (1970).

45. Zwickler v. Koota, 389 U.S. 241, 249-50 (1967); Annot., 45 L.ED.2d 725, 729 (1976).

46. For an analysis of the intertwining of the overbreadth and vagueness doctrines in the areas of the first amendment, see, Note, *supra* note 44, at 871-75.

47. Note, *supra* note 44 at 871.

on the speaker, the audience, and the interaction of the speaker and the audience, the regulation would not be focused enough to give advance warning of its reach and thus it suffers from latent vagueness.[48]

The Supreme Court has held that the overbreadth doctrine should be limited to freedoms guaranteed by the Bill of Rights.[49] In applying the doctrine in the first amendment context, the Court in *Broadrick v. Oklahoma*[50] held that any enforcement of an allegedly overbroad statute is forbidden until a limiting construction or partial invalidation narrows it so as to remove its seeming threat to constitutionally protected expression.[51] However, in areas where speech plus conduct are involved, the Court provides a more rigorous test before invalidating an allegedly overbroad statute. Here, the "overbreadth" must be real and substantial and judged in relation to the statute's "plainly legitimate sweep."[52] Notwithstanding the general rule requiring a limiting construction, an overbroad statute cannot be given a saving construction if it is impossible to define a precise category of conduct privileged by the first amendment which can be clearly stated to fall outside the reach of the statute.[53]

"The overbreadth doctrine is premised on serious judicial concern about chilling effect."[54] Nonetheless, a statute found to have a chilling effect is not automatically invalidated. The Court utilizes a balancing test, upholding the statute if the government interest is compelling and substantially connected to the restriction.[55] "The

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48. The Supreme Court has, in several instances, applied both doctrines without making clear distinctions between them. *E.g.*, Adderley v. Florida, 385 U.S. 39, 42 (1966) (students protesting on jail premises); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (students protesting in vicinity of court house); NAACP v. Button, 371 U.S. 415, 435 (1963) (statute banning improper solicitation of any legal or professional business invalid since broad and vague).

49. Dandridge v. Williams, 397 U.S. 471 (1970). The doctrine's concept of "overreaching" has no place in a case involving state regulation in the social and economic field since the Constitution does not empower the court to second-guess officials charged with the responsibilities of allocating limited public welfare funds. *Id.* at 487.

50. 413 U.S. 601 (1973).

51. This is known as the chilling effect. *Id.* at 613.

52. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

53. L. TRIBE, *supra* note 9, § 12-26 at 716 n.13 (1978).

54. Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U.L. REV. 532, 535 (1974).

55. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Watkins v. United States, 354 U.S. 178, 198 (1957) (holding that Congress cannot question a witness as to his indi-

chilling effect permits the Court to focus on the detriment to the aggregate associational rights of all those in the group affected rather than on the individual before it."[56]

Summarily, the overbreadth doctrine has been applied to three first amendment situations: to statutes which by their terms seek to regulate "only spoken words"; to statutes which by their broad sweep ensnare rights of association; and, to statutes which by their terms purport to regulate the time, place, and manner of expressive conduct without providing adequate standards for their application, thus resulting in virtually unreviewable prior restraints in first amendment rights.[57]

3. Prior Restraint Doctrine

A prior restraint is a formal prohibition on speech that is imposed in advance of expression.[58] The prior restraint doctrine forbids the government to restrict or prohibit expression in advance of publication, even though the material published may be subject to subsequent restraint.[59] The Supreme Court considers prior restraint to be more serious than subsequent restraint because of chilling effect inherent in restraining speech prior to its expression.[60]

Nonetheless, prior restraints are not unconstitutional *per se*.[61] They are only presumed unconstitutional and the government carries a heavy burden of showing justification for the impcsition of such a restraint.[62] Since first amendment rights have never been

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vidual affairs if unrelated to any legislative purpose).

56. Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 824 (1969) (footnote omitted); *See* Note, *supra* note 44, at 852-58.

57. Annot., 45 L.ED.2d at 730.

58. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 520 (1977).

59. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 454 (1980).

60. J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 741 (1978).

61. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

> [A] system of prior restraint runs afoul of the first amendment if it lacks certain safeguards. First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. at 560.

62. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam)

deemed absolute, exceptions are made to the prior restraint doctrine. To date, the Court has permitted prior restraint in three areas: obscenity regulation,[63] regulation of seditious activities,[64] and regulation to prevent direct and immediate harm to life or national security.[65]

B. *National Security*

Power over national security and over external affairs in general is vested exclusively in the national government.[66] Within the realm of external affairs, the President and the Congress share authority. Since the scope of national security covers vast areas of responsibility, these branches of government delegate much of their authority to various agencies and departments created by Congress. In delegating their authority, the President and Congress prescribe certain standards that often leave room for the delegatee to construct secondary rules. For example, the Secretary of State has promulgated various regulations on the right to travel pursuant to the authority delegated to the State Department by Congress in the Passport

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(government did not satisfy its heavy burden of showing that the New York Times' and the Washington Post's publication of the contents of a classified study of United States' decision-making process on Viet Nam policy would damage national security); Organization For A Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (real estate broker did not satisfy heavy burden of showing that his interest in being free of public criticism in his business practices warranted an injunction of the Organization For A Better Austin's peaceful distribution of informational literature); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *mandamus denied sub. nom.* Morland v. Sprecher, 443 U.S. 709, *dismissed,* 610 F.2d 819 (7th Cir. 1979) (government sufficiently established that irreparable harm was threatened by plan of magazine publisher to publish article describing method of manufacturing and assembling hydrogen bomb).

63. Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961) (previous restraint allowed in exceptional cases of expression such as obscenity, hindrance to government war efforts, incitement to violence and overthrow of government by force); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (indicated that the prior restraint doctrine was not absolute).

64. *See* Near v. Minnesota, 283 U.S. at 716 (dictum).

65. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) ("Pentagon Papers" case). *See infra* text accompanying notes 105-10.

66. United States v. Pink, 315 U.S. 203, 233 (1942). (The Court held that New York was without power to deny effect to Soviet nationalization decrees since state policies become irrelevant to judicial inquiry when the United States, in acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts). The federal government's power over national security should not be read as a preemption of the states' police power in protecting the safety and welfare of its citizens.

Act.[67] Furthermore, in the area of national security, certain restrictive measures are permitted. To prevent employees from disclosing classified information, agencies and departments utilize secrecy agreements which, because of national security considerations, have been upheld as not violating the doctrine of prior restraint.

1. President

Article II, section 2 of the United States Constitution, is the primary source of the President's power.[68] Because of the need for uniform decisionmaking in the area of external affairs, jurisdiction over such matters has always been vested in the national government rather than in the states.[69] Accordingly, it has been the duty of the President to speak or listen as the Representative of the Nation.[70]

Notwithstanding the President's predominance in foreign affairs, presidential actions must still be in harmony with the acts of Congress.[71] In certain instances, Congress can delegate some of its powers to the President.[72] Since the President cannot perform all delegated functions in person, the President is allowed to subdelegate.[73]

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67. *See infra*, note 90.

68. Specifically, U.S. CONST. art. II, § 2 empowers the President to be Commander in Chief of the military, to make treaties subject to the approval of two-thirds of the Senate, to grant reprieves and pardons, to fill Senate vacancies that arise during recess of the Senate, and to nominate and appoint Ambassadors, Justices of the Supreme Court, and other officers with Senate approval.

69. The basic rule that the Federal Government can exercise no powers except those enumerated and such implied powers as are necessary and proper, is true only in respect of internal affairs. In the field of foreign affairs, the power of the nation is not restricted to the specific grants in the Constitution. In that field, federal authority stems from the very existence of the United States as an independent country.

B. SCHWARTZ, CONSTITUTIONAL LAW, A TEXTBOOK § 5.13 at 185 (2d ed. 1979).

70. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (President has inherent authority in matters involving foreign affairs).

71. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Justice Jackson, in his concurring opinion, stated that there were three levels of presidential authority: maximum authority when the President acts pursuant to express or implied congressional authorization, a lower level of authority when he acts without congressional authorization but in an area of concurrent legislative and executive authority, and minimum authority when he acts inconsistent to Congress' will. *Id.* at 635-38.

72. *See infra* text accompanying notes 76-80 for a more detailed discussion of Congress' power to delegate.

73. Through the "necessary and proper" clause of the Federal Constitution, Congress allows this subdelegation. United States v. Chemical Found. Inc., 272 U.S. 1, 13 (1926) (President allowed to subdelegate his authority since it is impossible for the

2. Congress

Article I of the United States Constitution is the source of congressional power. Through the "necessary and proper" clause,[74] Congress can effectuate its powers by employing all means rationally related to its ends and not prohibited by the Constitution.[75]

To secure its ends, Congress often delegates its powers to nonlegislative or subordinate officers and bodies. However, Congress is limited as to what powers it can delegate. Because of the principle of separation of powers,[76] Congress cannot delegate its general lawmaking powers.[77] Moreover, powers Congress can rightfully delegate must be circumscribed.[78] Congress must provide the delegatee with some standard for guidance in executing the law. Because this standard is often laid down in very broad and general terms in order to allow flexibility and practicality, the delegatee is left to construct secondary rules within defined limits and to determine the facts to which the law is applicable.[79] Where the power delegated might affect freedoms guaranteed by the Bill of Rights, extremely explicit standards are required. Otherwise, any vagueness encountered will result in an invalid delegation.[80]

In general, great deference is given to the officer or agency

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President to determine how enemy property should be sold in every instance); Grundstein, *Presidential Subdelegation of Administrative Authority in Wartime*, 16 GEO. WASH. L. REV. 301, 306 (1948).

74. U.S. CONST. art. I, § 8, cl. 18.

75. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) (implied power principle). *See supra* note 69.

76. This principle is derived from the general constitutional framework which provides the powers and limitations of each branch, namely, articles I, II, and III.

77. Legislative powers enumerated in art. I cannot be delegated to any other agency or person. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (statute empowering President to prohibit the interstate shipment of hot oil unconstitutional because of inadequate standards).

78. United States v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co., 282 U.S. 311, 324 (1931) (Interstate Commerce Commission, pursuant to its delegated power by Congress, cannot interfere with private property and rights unrelated to commerce).

79. For general principles of congressional delegation, see, Annot., 79 L.ED. 474 (1934).

80. New York v. United States, 342 U.S. 882 (1951). "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *Id.* at 884.

charged with the statute's administration.[81] This reflects the judicial consideration that an officer or agent interprets statutes based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case and that the officer determines the policy which will guide applications for enforcement of the statute.[82]

However, the Court does not defer to an administrative construction of a statute if there are compelling indications that such construction is wrong[83] or when it finds that approval by Congress is a necessary prerequisite to validation of the administrative construction.[84] In the latter situation, the administrative practice must be consistent and substantial enough to warrant the finding that Congress has implicitly approved it.[85] However, if the administrative practice has taken place over a long period of time, it only will be given deference if the agency's practice involves positive action—as

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81. Johnson v. Robison, 415 U.S. 361, 367-68 (1974) (law allowing educational benefits to veterans and to conscientious objectors in alternate services valid absent clear and convincing evidence of congressional intent holding otherwise); Espinoza v. Farah Mfg., 441 U.S. 86, 94-95 (1973) (no showing that Congress, through the Civil Rights Act of 1964, intended to make unlawful an employer's refusal to hire a person because he is not an American citizen); New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) ("[t]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong"). *Id.* at 421 (citations omitted).

82. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) (administrator's opinion that the Fair Labor Standards Act does not require overtime pay for employee time spent in fire hall subject to call to fire alarm is a valid construction since employees were rarely interrupted in their normal eating and sleeping time).

83. Espinoza v. Farah Mfg., 414 U.S. 86 (1973); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 421 (1973); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (holding neither Communication Act nor first amendment requires broadcasters to accept paid editorial advertisements); Red Lion Broadcasting Co. v. Federal Communication Comm'n, 395 U.S. 367 (1969).

84. Zemel v. Rusk, 381 U.S. at 12. Here, the Court found implicit congressional approval authorizing the Secretary to impose area restrictions pursuant to 22 C.F.R. § 51.75. In Kent v. Dulles, 357 U.S. at 129, the Court invalidated 22 C.F.R. § 51.135 which allowed the Secretary to deny passports to those persons the Secretary believed were supporting the Communist movement.

85. Zemel v. Rusk, 381 U.S. at 12. Factors allowing the favorable application of judicial deference include contemporaneous longstanding construction, uniformity, conformity to judicial decision, reasonableness, and congressional approval. *See* Annot., 39 L.Ed.2d 942, 964-71 (1975). Notwithstanding these factors, the Supreme Court will narrowly construe all delegated powers that curtail or dilute activities which are often natural and necessary to a person's well being. Kent v. Dulles, 357 U.S. at 129.

opposed to a practice of not acting.[86]

3. The Passport Act

An example of delegation of authority is the Passport Act which Congress enacted in 1856. This Act centralized authority to issue passports in the Secretary of State.[87] Prior to this enactment, various federal, state and local officials, as well as notaries public were allowed to issue passports.[88] The Passport Act, as currently amended, allows the Secretary of State to grant and issue passports "under such rules as the President shall designate."[89] Pursuant to this Act, the Secretary has enacted many regulations that qualify the right of Americans to travel abroad.[90]

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86. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957) (failure of Federal Trade Commission to invoke § 7 of Clayton Act against vertical stock acquisition did not create a binding administrative interpretation that Congress did not intend vertical acquisition to come within the purview of the Act); Corn Prod. Refining Co. v. Federal Trade Comm'n, 324 U.S. 726 (1945) (failure of Federal Trade Commission to take any action against the use by manufacturers of a basing point price did not constitute a settled administrative construction indicating the inapplicability of the Clayton Act); Union Stockyard & Transit Co. v. United States, 308 U.S. 213 (1939) (failure of Interstate Commerce Commission to assert jurisdiction over other stock yards performing like services did not amount to an administrative construction of the Interstate Commerce Act).

87. 22 U.S.C. § 211(a) (1976). Zemel v. Rusk, 381 U.S. at 31-32 (Goldberg, J., dissenting).

88. Kent v. Dulles, 357 U.S. at 123.

89. In pertinent part, the Act provides that:

> The Secretary of State may grant and issue passports . . . under such rules as the President shall designate. . . . Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where annual hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers.

22 U.S.C. § 211(a) (1976).

90. An example of the regulations the Secretary has enacted is 22 C.F.R. § 51.70(b)(4) (1979) which provides that: "A passport may be refused in any case in which: the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. . . ." Section 51.70(b)(4) has never been used as a basis for refusing to issue a passport. It has been used to revoke a passport when the bearer has engaged in activity abroad which, although not violative of American law, could seriously compromise American relations with foreign countries. *Developments In The Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1150 n.76 (1972). *E.g.*, the Secretary revoked the passports of Charles McKissack, attorney for Mrs. Mary Sirhan, and his attorney pursuant to § 51.70(b)(4) in 1979. There have been five instances where the Secretary has denied issuance of passports pursuant to

In interpreting the Act, various executive officers, including the President, have construed it as granting the Secretary absolute discretion.[91] However, the Supreme Court rejected this notion in *Kent v. Dulles*.[92] At issue in *Kent* was the validity of State Department regulations prohibiting the issuance of passports to members or supporters of the Communist Party who were going abroad to engage in activities which would advance the Communist movement.[93] In construing the Passport Act, the Court found it difficult to determine the extent of the Secretary's power to issue passports: the Secretary's authority, while broadly expressed, had generally been narrowly exercised.[94] The *Kent* majority held that a citizen's right to travel could not be limited without due process of law and that absent congressional approval, the Secretary's discretion to grant or withhold a passport extended only to questions of the citizen's allegiance or criminal conduct.[95] Three justices in *Kent* dissented on the ground that the Secretary had a necessarily broad discretionary authority in matters of national security. Since national emergencies

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§ 51.70(b)(4): One in 1906 involving a notorious promoter of gambling and prostitution, Agee v. Muskie, 629 F.2d 80, 99 (D.C. Cir. 1980) (MacKinnon, J., dissenting). The second denial involved a blackmailer who was "disturbing or endeavoring to disturb, the relations of this country with the representatives of foreign countries." *Id.* (MacKinnon, J., dissenting) (citing *1907 Foreign Relations of the United States*, Part 2 at 1076, 1080, 1082-83). The third denial involved a national who supplied arms to various countries. The other two denials were made prior to the passage of the Passport Act of 1926. Denial of these passports seems only tenously related to § 51.70(b)(4)'s concern for the national security. *Id.* at 86 n.7. Another regulation is 22 C.F.R. § 51.71(a) (1979) which provides that a "passport may be revoked, restricted, or limited where: (a) the national would not be entitled to issuance of a new passport under § 51.70." *See also supra* note 84.

91. Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 173 (1952).

92. 357 U.S. 116 (1958). In *Kent*, the Court held that the right to travel was constitutionally protected and could not be infringed upon without the due process of law of the fifth amendment. Thus, the Secretary was without power to refuse issuance of passports to persons who would not furnish affidavits of their non-affiliation with Communist organizations. *See also*, Aptheker v. Secretary of State, 378 U.S. 500 (1964). "[F]reedom of travel is a constitutional liberty closely related to rights of free speech and association. . . ." *Id.* at 517.

93. Kent v. Dulles, 357 U.S. at 117-18.

94. *Id.* at 127. Historically, the Secretary has based his authority to deny passports on two grounds: lack of citizenship or allegiance to the United States and illegal conduct. Therefore, these are the only grounds which it could be argued that congress adopted in light of prior administrative practice. Zemel v. Rusk, 381 U.S. at 17-18; Kent v. Dulles, 357 U.S. at 128.

95. Kent v. Dulles, 357 U.S. at 129.

required swift action, it was impractical for the State Department "to appeal to Congress for further legislation in each new emergency."[96]

The majority holding of *Kent* was affirmed in *Zemel v. Rusk*.[97] In *Zemel*, the Court upheld the power of the Secretary to impose an area restriction on travel to Cuba. The *Zemel* majority was able to find implicit congressional approval of such area restrictions through "sufficient" past administrative practices.[98] The Court held that even though the Passport Act grants broad rule-making authority to the Executive Branch, it does so only to the extent of maintaining practicality and flexibility in the Act's provisions; the Act could not be construed as granting the Secretary unbridled discretion. The Secretary must enact regulations consistent with the Passport Act and fifth amendment due process.[99] Two justices in *Zemel* dissented on the ground that the Secretary's power during times of peace was not as broad as during times of war.[100] A third justice dissented on the ground that the Constitution vests all legislative power in Congress and thus the Executive Branch "has no more power to make laws by labeling them regulations than to do so by calling them laws."[101]

4. Enforcement of Government Secrecy Agreements

In seeking to protect national security, federal intelligence organizations require their employees to contractually bind themselves

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96. *Id.* at 133.

97. 385 U.S. 1 (1965). In *Zemel*, the Court upheld the Passport Act against the claim that it violated the fifth amendment right to gather information and associate. In dismissing the fifth and first amendment claims the Court held that, considering the Cuban missile crisis, the Secretary of State was justified in restricting travel to Cuba and that no first amendment rights were involved since the right to speak and publish does not carry with it the unrestrained right to gather information. *See also* Dayton v. Dulles, 357 U.S. 144 (1958) (Secretary's reasons for denying a passport to an alleged Communist supporter were not authorized by Congress).

98. Zemel v. Rusk, 381 U.S. at 8-12.

99. United States v. Karnuth, 30 F.2d 242 (2d Cir.), *cert. denied*, 279 U.S. 850 (1929) (failure of immigrant to have his passport visaed by American consul is sufficient basis for denial of his admission under the Immigration Act, ch. 190, 43 Stat. 153 (1924) since the regulation was consistent with the underlying statute (Immigration Act)). Boudin v. Dulles, 136 F. Supp. 218, 220 (D.D.C. 1955) (right to travel abroad is an attribute of personal liberty which may not be infringed upon absent full compliance with the requirements of due process).

100. Zemel v. Rusk, 381 U.S. at 26 (Douglas and Goldberg, JJ., dissenting).

101. *Id.* at 20. (Black, J., dissenting).

not to disclose classified information. This government secrecy agreement is the primary device utilized by government to prevent "leaks" of classified information.[102] Government agencies make use of two types of agreements: the standard form and the prepublication review form. The standard form proscribes the release of classified information while the prepublication review form requires the employee to submit any agency related information to his agency before publishing.

The standard form contract has been held by the Fourth Circuit Court of Appeals not to violate the first amendment since it only restricts the dissemination of classified information—a restriction reasonably related to the government's interest in protecting national security.[103] The Supreme Court upheld the validity of prepublication review agreements since the agreements are a reasonable means of protecting "the effective operation of our foreign intelligence service."[104]

5. The National Security Exception to Prior Restraint

As stated earlier in this note,[105] three exceptions have been applied to the doctrine of prior restraint. In the area of national security, both the dictum in *Near v. Minnesota*[106] and in *New York Times Co. v. United States*[107] suggest that the degree and imminency of harm to national security necessary to invoke the exception must be determined on a case by case basis.[108]

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102. Comment, *Government Secrecy Agreements and the First Amendment*, 28 AM.U.L. REV. 395 (1979).

103. United States v. Marchetti, 466 F.2d 1309, 1316-17 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). Marchetti, after resigning from his almost fourteen years of service with the CIA, publicized his criticisms of the agency. The CIA successfully enjoined publication until Marchetti complied with his secrecy agreement not to disclose classified information.

104. Snepp v. United States, 100 S.Ct. 763 (1980) (per curiam) (CIA brought suit following Snepp's book, Decent Interval, in contravention of the secrecy agreement's covenant for prepublication review). For a critical analysis of the *Snepp* decision, see Camp, *Enforcement of CIA Secrecy Agreements: A Constitutional Analysis*, 15 COLUM. J.L. & SOC. PROBS. 455 (1980). For an overview of the relationship between government secrecy agreements and the first amendment, see Comment, *supra* note 102.

105. *See supra* text accompanying notes 63-65.

106. 283 U.S. at 716 (dictum).

107. 403 U.S. 713.

108. Note, *The National Security Exception to the Doctrine of Prior Restraint*, United States v. Progressive, Inc., 60 NEB. L. REV. 400, 408 (1981) [hereinafter cited

The Supreme Court has not formulated a definite standard as to when the national security exception is applicable. In *New York Times,* the concurring opinion of Justice Brennan makes reference to a two-prong analysis: first, the first amendment freedom must fall within an extremely narrow class of cases in which the first amendment's ban on prior judicial restraint may be overridden. Secondly, the purported national security interest must be threatened inevitably, directly, and immediately to overcome the heavy presumption against prior restraints.[109]

Also in *New York Times,* Justice Stewart, in a concurring opinion joined by Justice White, considered prior restraint to be permissible when the danger to national interests was direct, immediate, and irreparable or where congressional legislation authorizes its use.[110] It is unclear as to which view will be utilized in the future. In the meantime, as a result of the vague nature of national security interests, the lack of an exacting standard with which to apply the national security exception creates a chilling effect upon protected rights.

III. HAIG V. AGEE

In 1974, Phillip Agee, a United States citizen residing in West Germany and a former CIA employee, announced a campaign to abolish the CIA.[111] In a London press conference, Agee avowed "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating."[112] The United States Department of State revoked Agee's passport by letter in December, 1979 pursuant to its authority under 22 C.F.R. sections 51.70 (b)(4) and 51.71(a).[113] In this letter, the Department ad-

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as *The National Security Exception*].

109. New York Times Co. v. United States, 403 U.S. at 726-27.

110. *Id.* at 730.

111. Haig v. Agee, 453 U.S. at 283. Phillip Agee was a CIA employee from 1957 to 1968.

112. A partial text of Agee's press statement is as follows:

> Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating; secondly, to seek within the United States to have the CIA abolished.

Id. at 283 n.2.

113. The letter delivered to Agee in Hamburg, West Germany explains that:

> The Department's action is predicated upon a determination made by the Sec-

vised Agee of his right to an administrative hearing,[114] but Agee declined this procedure and filed suit against the Secretary in United States District Court.[115]

The court granted summary judgment for Agee,[116] holding that the regulation authorizing revocation of a passport on grounds of national security or foreign policy considerations was invalid for lack of congressional authorization.[117] The United States Court of Appeals for the District of Columbia affirmed, holding that the Secretary had not shown that Congress had authorized the regulation either by express delegation or by implied approval of a substantial and consistent administrative practice.[118]

The Department of State was granted certiorari to the Supreme Court to resolve the issue of whether the Passport Act authorized the Secretary's action pursuant to the policy announced by the challenged regulation. In holding that it did, the Supreme Court, in a majority opinion written by Chief Justice Burger, considered the "broad rule-making authority granted in the Act" and maintained

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retary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign, you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and the foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

Id. at 286. Since the Secretary revoked rather than refused to issue Agee a passport, 22 C.F.R. § 51.71(a) was also applied.

114. *Id.* at 287.

115. Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980). Agee contested the revocation on five grounds: (1) that 22 C.F.R. § 51.70(b)(4) has not been authorized by Congress and is therefore invalid; (2) that 22 C.F.R. § 51.70(b)(4) is impermissibly vague and overbroad; (3) that the revocation of his passport prior to a hearing violated his fifth amendment right to procedural due process; (4) that the revocation of his passport violated his right to travel; and (5) that his passport was revoked in order to punish him and suppress his criticism of government policy in violation of the first amendment. Agee v. Muskie, 629 F.2d 80, 82 (D.C. Cir. 1980).

116. The district court granted the motion only on the ground that 22 C.F.R. § 51.70(b)(4) was not authorized by Congress and therefore invalid. Since the regulation was held invalid, the court found it unnecessary to consider Agee's other grounds for relief. Agee v. Vance, 483 F. Supp. at 732.

117. *Id.*

118. Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980).

that "a consistent administrative construction of that statute must be followed by the courts 'unless there are compelling indications that it is wrong.' "[119] Unlike the lower courts, the Supreme Court accepted the Secretary's contention that an unbroken series of executive orders, regulations, instructions to consular officials, and notices to passport holders constituted a longstanding administrative construction.[120] In rendering its decision, the Court found no merit in Agee's first amendment claims, reasoning that it was unnecessary to fully address such issues since the Secretary had authority to revoke passports.[121]

The dissenters,[122] in an opinion written by Justice Brennan, stressed the importance of limiting the Secretary's discretionary power absent clear congressional approval. He argued that the general rule of giving great deference to the administrative construction of a statute does not apply when such construction impinges on an individual's constitutional liberties. Furthermore, the dissent pointed out that the *Kent* and *Zemel* holdings that require clear congressional approval of regulations enacted by the Secretary stand as procedural limitations that protect constitutional liberties from any abuse of the Secretary's discretionary power.[123] However, the majority held that the Secretary's action was reasonable and that Agee's right to hold a passport is subject to reasonable government regulation and is subordinate to foreign policy and national security

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119. Haig v. Agee, 453 U.S. at 291 (quoting E.I. duPont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977)). Chief Justice Burger was joined by Justices Stewart, White, Blackmun, Powell, Rehnquist and Stevens. Justice Blackmun filed a concurring opinion. Although agreeing with the majority's disposition, he, like the dissent, felt that the Court's disposition could not be reconciled with Zemel v. Rusk and Kent v. Dulles and that the Court was, in effect, overruling these precedents sub silentio. Haig v. Agee, 453 U.S. at 310.

120. Haig v. Agee, 453 U.S. at 298. The court of appeals and the district court both concluded that the series of orders, regulations, and instructions were inapposite to the issue of implicit congressional authority to invoke national security or foreign policy considerations during peacetime. Agee v. Muskie, 629 F.2d at 87; Agee v. Vance, 483 F. Supp. at 731.

121. The lower courts also did not consider the constitutional questions put forth by Agee since by answering the threshold question of whether the regulation was valid in the negative, the courts did not have to reach the constitutional issue of whether the regulation violated Agee's rights. The Supreme Court, conversely, answered the threshold question in the affirmative and stated that it need not reach the constitutional issue since the Secretary was found to have authority to revoke Agee's passport.

122. The dissent was composed of Justices Brennan and Marshall.

123. *See supra* text accompanying notes 95-99.

considerations.[124]

IV. ANALYSIS

In upholding the Secretary's authority to revoke passports on national security grounds, the Court reasoned that since the Secretary had authority to revoke passports, Agee's first amendment claim had no foundation. However, the Court previously stated in *Kent v. Dulles*[125] that the validity of the Secretary's actions rested not in the bare fact that he had discretion, but, "in the *manner* in which the Secretary's discretion was exercised."[126] In considering the "manner" in which the Secretary's discretion was exercised, the individual's right to travel should be balanced with the extent and necessity of the government restriction. This procedural step permits greater protection of the constitutionally protected right to travel.[127] The *Agee* Court sidestepped this procedural measure by holding that because the Secretary had discretion to curtail the travel of anyone having the likelihood of causing serious damage to national security, Agee's constitutional claim had no basis.[128] The Court based its decision not on constitutional grounds, but rather on grounds of national security. The ensuing analysis will argue that the Court built its national security argument on a weak foudation, but that had the Court undertaken a thorough analysis of the constitutional issues, it could have reached the same result but on a much stronger foundation.

A. National Security Considerations

In making its decision in *Agee,* the Court seemed more eager to preserve the national security interests threatened by Agee's disclosure of classified information than to protect the rights of citizens to travel. This may have been more the result of being oriented toward a particular goal than of any desire to ignore personal rights. The majority took judicial notice of Agee's possible involvement in the Iranian crisis.[129] The Court noted that a government affidavit showed that Agee contacted the Iranian captors, urging them to de-

124. Haig v. Agee, 453 U.S. at 306.

125. 357 U.S. 116 (1958).

126. *Id* at 125.

127. *See supra* note 123.

128. *See supra* note 121.

129. Haig v. Agee, 453 U.S. at 286 n.8.

mand certain CIA documents.[130] Given the information contained in the affidavit and the impact of Agee's prior disclosures of United States intelligence activities throughout the world, the need for swift government action may have prompted the Court to subscribe to the Secretary's authority after only a cursory consideration of Agee's rights.[131] Nonetheless, the duty to reflect the nation's concern should be subordinate to the Court's obligation to objectively weigh all issues presented to it. This was recognized in Justice Brennan's dissent:

> This case is a prime example of the adage that 'bad facts make bad law'. Phillip Agee is hardly a model representative of our nation. And the Executive Branch has attempted to use one of the only means at its disposal, revocation of a passport, to stop respondent's damaging statements. But just as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers.[132]

In upholding the Secretary's authority to revoke passports on national security grounds, the *Agee* Court focused on "broad rule-making authority" granted in the Passport Act.[133] Although the Court seemed to be basing its authority on *Zemel,* which held that "the weightiest considerations of national security" authorized the Secretary to impose an area-wide restriction to Cuba,[134] the *Agee* Court's rationale is inapposite to *Zemel's.* The *Zemel* Court spoke of the Passport Act as continuing the broad rule-making authority granted the Executive Branch by the Passport Act of 1856. The Act grants broad authority in order to maintain the practicality and flexibility of its provisions in light of the often changeable and explosive na-

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130. *Id.* at 2771 n.7.

131. An article in the *New York Post* on December 17, 1979 reported that "Agee would be invited to visit Iran and serve on an 'international tribunal' created by Ayatollah Khomeini to pass judgment on the prisoners held in the American Embassy in Tehran. Agee denied being 'invited to Iran by its government, The Revolutionary Council, or any representative thereof . . .'."
Agee v. Muskie, 629 F.2d at 81, n.1. Both the district court and the court of appeals found this factual dispute to be irrelevant in determining whether Agee's passport should have been revoked. Agee v. Vance, 483 F. Supp. at 732; Agee v. Muskie, 629 F.2d at 81 n.1. *See Haig,* 453 U.S. at 286 n.8 and 288 n.14.

132. Haig v. Agee, 453 U.S. at 280 (Brennan, J., dissenting).

133. *Id.* at 301 (quoting Zemel v. Rusk, 381 U.S. at 12).

134. Zemel v. Rusk, 381 U.S. at 16.

ture of international affairs.[135] Conversely, the *Agee* Court seems to construe the Act as granting an automatic bestowal of power in the Secretary so long as no compelling indications arise to prove that such a construction is wrong.[136]

Furthermore, the overriding considerations in *Zemel* were much weightier than those in *Agee*. In *Zemel*, the Court was able to consider the Secretary's actions in light of a substantial administrative practice—namely, the consistent imposition of area restrictions during war and peacetime both before and after the enactment of the Passport Act.[137] However, the *Agee* Court was able to find only an administrative *policy* consisting of executive orders, regulations, instructions to consular officials, and notices to passport bearers.[138] The majority argued that it would be anomalous to hold that no substantial administrative practice existed merely because there were so few occasions for the Secretary to exercise the announced policy and practice.[139]

In its search for congressional approval, the Court asserted that in the areas of foreign policy and national security, congressional silence should not be equated with congressional disapproval.[140] However, as Justice Brennan pointed out in his dissent, congressional silence must be viewed in context.

> Only when Congress had maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations—where the parties will presumably object loudly, perhaps through legal action, to the Secretary's exercise of discretion—can this Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion.[141]

The majority noted that the history of passport restrictions shows congressional recognition of Executive authority to withhold pass-

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135. *Id.* at 17.

136. Nonetheless, both the *Zemel* Court and the *Agee* Court seemed to have overlooked the fact that the first amendment interests are equally at issue with the right to travel. Considerations of the first amendment interests, not only of the particular individual, but of society in general would provide more of a safeguard to individual liberties.

137. Zemel v. Rusk, 381 U.S. at 9, 11.

138. Haig v. Agee, 453 U.S. at 298.

139. *Id.* at 303.

140. *Id.* at 291.

141. *Id.* at 315.

ports on the basis of substantial reasons of national security and foreign policy.[142] However, history also shows Congress' reluctance to grant the Secretary more power than that implied through established administrative practice.[143] In addition, congressional intent that signifies a reluctance to broaden the Secretary's power can be inferred from the House's recent passage of a bill which would make it a crime to disclose the identity of American intelligence agents working under secret cover.[144]

Therefore, the intent of Congress may not be as clear as the majority indicated. Since the Supreme Court in *Agee* did not resolve any of the constitutional questions, it is foreseeable that another case may arise in the future demanding a constitutional solution which will narrow the Secretary's broadened power. Arguably, Con-

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142. *Id.* at 293.

143. Following the Supreme Court's decision in Kent v. Dulles, President Eisenhower and Secretary Dulles urged Congress to pass Administration Bill S 4110, 85th Cong., 2d Sess. (1958). This bill would have changed the effect of the *Kent* ruling. However, the measure was never enacted since objections were made to the almost unlimited discretion the bill would have given the Secretary in denying passports. *Congressional Quarterly Almanac*, Vol. XIV, 703 (1958). For information on what the bill entailed, see 39 U.S. Dep't of State Bull. 253-54 (1958, July-Dec.). Moreover, a statement by John V. Lindsay, a member of Congress from New York, made in regard to H.R. 1919 (providing for denial of passports to members and former members of the Communist Party) supports the concern regarding the Secretary's discretionary power:

> Freedom to travel, like other liberties, is subject to reasonable regulation and control in the interests of the public welfare. . . . However, a general standard under which the Secretary of State is authorized to deny the issuance of a passport whenever he finds that its issuance would be contrary to the national welfare, safety, or security, or otherwise prejudicial to the interests of the United States, is too indefinite a standard when applied to a right as firmly grounded among our basic liberties as is freedom of speech and assembly. In the past we have often seen examples of executive arbitrariness under the umbrella of "national security" and "the conduct of foreign relations."

Hearings before the Committee on Foreign Affairs on H.R. 9069 and other bills relating to the issuance of passports, 86th Cong., 1st Sess. 95 (1959). Also, the State Department failed to gain congressional approval of broadening the Secretary's discretion in H.R. 14895, 89th Cong., 2d Sess. (1966).

144. H.R. 4, 97th Cong., 1st Sess. (1981). The thrust of the bill passed on September 23, 1981 is to penalize those who endanger the lives of others through their speech. As Representative C.W. Young, Republican of Florida, stated in the debate, "What we're after today are the Phillip Agees of the world." N.Y. Times, Sept. 24, 1981 at A15, col. 3. There has been some criticism to the bill as imposing a prior restraint on the first amendment rights of journalists and other commentators. However, the national security exception to prior restraint, arguably, may serve to subordinate these rights for the sake of the public welfare.

gress, in attempting to "get the Phillip Agees of the world"[145] should explicitly set out some guidelines by which the Secretary may exercise his discretionary power to revoke passports without undergoing litigation when the "national security" is at stake. So far, Congress has chosen not to do so. Although this may imply that Congress does not wish to limit the Secretary's discretion, it can also be interpreted to mean that Congress has no intention of increasing it either. However, despite this uncertain congressional intent, *Haig v. Agee* effectively increases the Secretary's discretionary power.

B. First Amendment Considerations

In upholding the Secretary's authority to revoke passports on the ground of "national security," the Court found it unnecessary to assign much importance to Agee's constitutional claim. It was suggested above that this may have been the result of a goal—oriented attitude on behalf of the Court. However, even if the Court had seriously considered Agee's first amendment claim, it could have still possibly concluded that the Secretary had the authority to revoke Agee's passport. Although this ultimate conclusion would have been the same by considering the constitutional issue, the Court's approval of the Secretary's discretion would have been limited to this particular instance, rather than being a blanket approval of actions by the Secretary to infringe on personal rights in the name of national security.

If it had undertaken a thorough first amendment analysis, the Court most likely could not have utilized the clear and present danger test.[146] The Court has held in the past that the clear and present danger test is not applicable when the regulation is aimed at conduct and speech is only incidentally affected.[147] In *Agee,* the Court found that although the Secretary's revocation rested in part on the content of Agee's speech, the revocation operated to inhibit Agee's action rather than his speech.[148] Although the Supreme Court noted that Agee's expression had the effect of markedly increasing the likelihood that individuals identified as agents would become the victims of violence[149] and that Agee's expression inhibited the

145. *See supra* note 144.

146. *See supra* note 22 and accompanying text for applicability of test.

147. American Communication Ass'n v. Douds, 339 U.S. 382 (1950). *See also* Dennis v. United States, 341 U.S. 494 (1951).

148. Haig v. Agee, 433 U.S. at 309.

149. *Id.* at 285 n.7.

United States from obtaining information, thereby presenting a threat to national security,[150] the clear and present danger test is not a viable test in determining whether Agee's expression was privileged. This is because the aim of 22 C.F.R. § 51.70(b)(4), under which Agee's passport was revoked, is directed to activities that cause or are likely to cause serious damage to the national security of the United States rather than inhibiting expression.

In addition, the Supreme Court was correct in noting that the content of Agee's speech obstructed the government's interest.[151] However, such a characterization does not remove the speech from first amendment protection as the majority suggests. Rather, the level of proof necessary to justify an infringement of expression is lowered.[152] The government interest in preventing public disclosure of classified information definitely outweighs Agee's right to free speech. Moreover, his contract with the CIA to not disclose such information is sufficient justification for the government's infringement of his first amendment rights.

The major difficulty with the Court's decision is that it failed to consider the overbreadth of the regulation and the effect of its decision on future American travelers. The problem of overbreadth hinges on the Secretary's broad discretion as to what constitutes "serious damage" to national security and the nebulous nature of the term "national security interests."[153] This latent vagueness of the term "national security" and what constitutes "serious damage" provide the means by which the Secretary's authority under sections 51.70(b)(4) and 51.71(a) may be exercised so broadly as to not give fair warning to travelers who choose to voice their opinions in an international setting. Since the regulations provide inadequate guidelines as to what first amendment activities are privileged, ad hoc standards are used to determine the constitutional status of expression and thus no precise categories of privileged conduct can be formulated to permit a saving construction to remove the chilling

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150. *Id.* at 284-85.

151. *Id.* at 306.

152. *Id.* at 309. See *supra* note 28 for an articulation of the test for "speech plus" cases. In addition, since Agee signed a government secrecy agreement where he promised not to divulge information relating to the CIA, its activities or intelligence activities generally, his right to openly criticize the government in the area of the secret service is considerably lessened absent the agency's approval. The national security exception may serve to remove his speech entirely from the area of first amendment protection. *See supra* text accompanying notes 58-65 and 105-10.

153. *See supra* text accompanying note 48.

effect of the regulation.[154]

In determining whether the Secretary's actions resulted in an unconstitutional application of the regulation, the Court should analyze all the facts and weigh the expressive value of the speaker's claim against the harm the expression causes the government's interest of national security. The Court appeared to rely on the balancing test when it stated that passport issuance is subordinate to national security and foreign policy considerations and is thus subject to reasonable governmental regulation.[155] However, the Court never defined what "reasonable" governmental regulation is and focused most of its analysis on the history and policy behind the regulations' enactment. In doing so, the Court left unresolved the question of what type of first amendment conduct, if any, is privileged under the regulations so as to reduce the chilling effect to other travelers.

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154. *See supra* note 53 and accompanying text. Parallel to the requirement that overbroad regulations must be narrowly construed is the doctrine of least restrictive alternatives or less drastic means. In the instant case, no least restrictive alternative was realistically available to the government since its power to restrict the activities of an American traveler abroad is severely limited. In Agee v. Muskie, 629 F.2d at 104-07, Justice MacKinnon, in his dissent, noted that the Court in Kent v. Dulles, 357 U.S. 116, 1958, approved of the denial of passports where the person was participating in illegal conduct. 357 U.S. at 127. Thus MacKinnon offered draft indictments of Agee on the following charges:

(1) transmitting injurious defense information in violation of 18 U.S.C. § 793(d) (1976);

(2) having unlawful intercourse with a foreign government in violation of 18 U.S.C. § 953 (1967);

(3) committing treason in violation of 18 U.S.C. § 2381 (1976);

(4) aiding and abetting the kidnap of the American hostages in Iran in violation of 18 U.S.C. § 1201 (1976); and

(5) seditiously conspiring to commit extortion in violation of 18 U.S.C. § 2384 (1976).

The majority in Agee v. Muskie also agreed that had Agee been charged with a crime, his passport could have been validly revoked. 629 F.2d at 87. However, this is not a very practical alternative in terms of the government's desire to expediently deal with Agee. The length of time necessary to formally charge Agee with a criminal offense, and to get an indictment from the grand jury is not in the government's best interest in fulfilling its obligation to protect national security from what it perceives as immediate threats. Further evidence of no least restrictive alternative being available is the Supreme Court's contention that "[r]estricting Agee's foreign travel, although perhaps not certain to prevent all of Agee's harmful activities, is the only avenue open to the Government to limit these activities." Haig v. Agee, 453 U.S. at 308. However, the Court ignored the real question of what alternative existed in allowing the Secretary to revoke Agee's passport without allowing him unbridled discretion.

155. Haig v. Agee, 453 U.S. at 306.

In the instant case, Agee's conduct may have sufficiently warranted the revocation of his passport. However, the chilling effect of the regulation permits the Court to consider the consequences of the regulation in relation to the aggregate speech and associational rights of all those in the group rather than on the individual before it.[156] Viewed in this setting, the Court should not have confirmed the Secretary's authority to revoke passports without requiring some standards which would limit his discretion in order to protect individual rights. This fact was pointed out by Justice Brennan in his dissent, in which he stated that, "it is important to remember that this decision applies not only to Phillip Agee, whose activities could be perceived as harming the national security, but also to other citizens who may merely disagree with Government foreign policy and express their views."[157]

The *Agee* majority also stated that Agee's disclosure of intelligence operations and personnel was not constitutionally protected since the purpose and content of Agee's speech obstructed the national security interest.[158] Historically, the Court has held that government cannot seek to regulate the content of speech, but only the time, place, and manner of the expression.[159] The Court bypassed this issue of content regulation by stating that Agee's disclosures were for the purpose of obstructing intelligence personnel and that such disclosures were not protected. Since the government action was aimed at the communicative impact of Agee's disclosures,[160] the Secretary's actions could have been found valid if the government could have shown that the message triggering the regulation presented a clear and present danger or alternatively, was otherwise unprotected by the first amendment.[161] However, as stated earlier,[162] the clear and present danger test is not applicable to Agee's expression since his disclosures were not aimed at inciting anyone to violence or unlawful conduct.[163] With respect to the alternative that speech is unprotected, the Court suggested that the national secur-

156. *See supra* note 56 and accompanying text.

157. Haig v. Agee, 453 U.S. at 319.

158. *Id.* at 309.

159. *See supra* text accompanying note 17.

160. The Court recognized that the Secretary was concerned with the communicative impact of Agee's message when it stated that "[t]he revocation of Agee's passport rests in part on the content of his speech." Haig v. Agee, 453 U.S. 308.

161. L. TRIBE, *supra* note 9, § 12-3 at 585-86.

162. *See supra* text accompanying notes 143-47.

163. *See* Haig v. Agee, 453 U.S. at 283-84, n.2.

ity exception to prior restraint removed Agee's expression from first amendment protection.[164] Nevertheless, *Agee* does not present a prior restraint situation since the Secretary's revocation came after Agee's disclosures and, at most, served to deter him from making further disclosures. Therefore, the national security exception to prior restraint is not an appropriate means of removing Agee's expression from constitutional protection.

However, an appropriate approach for reconciling national security interests with the first amendment may be the balancing of the individual's need for expression (and the public interest of gathering information) against any harm the expression may cause legitimate government interests. The myriad of factors present in each case defy any one standard that would assist the Court in its decision. Thus, to accord expression purporting to damage the national security maximum first amendment protection, the Court should require the government to satisfy a heavy burden of proof regarding the ominous impact of the expression. Had the Court done so, it could still have held that the government's national security interest was sufficiently substantial enough to override Agee's first amendment claim.

V. CONCLUSION

In *Haig v. Agee,* the Supreme Court refused to order a reinstatement of a passport to a former CIA employee who threatened national security by publicly disclosing classified information. The Court held that the Passport Act authorized the Secretary of State to revoke passports on national security grounds pursuant to 22 C.F.R. section 51.70(b)(4). In upholding the Secretary's authority, the Court goes against the well-established precedents set by *Kent v. Dulles* and *Zemel v. Rusk.* These precedents require that before the constitutional liberties of a citizen can be infringed upon, a showing that Congress authorized the regulation, explicitly or implicitly through substantial and consistent administrative practice, must exist. The *Agee* Court did not find a substantial and consistent

164. "Long ago, however, this Court recognized that 'No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' " *Id.* at 308 (citing Near v. Minnesota, 283 U.S. 697, 716 (1931)). It is important to note that this exception to the prior restraint doctrine included the disclosure of military information in time of *war.* In view of the strong policy of the Court against prior restraints, it is questionable whether the exception could be expanded to include peacetime disclosures of United States' intelligence covert activities.

administrative *practice,* but instead, upheld the Secretary's authority by finding a consistent administrative *policy.*[165]

The effect of the Court's decision is to remove a crucial procedural limitation from the Secretary's discretionary power which has served to safeguard the protected freedoms of the American traveler. The Court's seemingly strong inclination to protect national security and its failure to adequately address the first amendment issue raise questions as to the future viability of the democratic notion of "free trade of ideas" regarding expatriates and dissident travelers.

The Court's holding that Agee has no first amendment claim because the Secretary had the authority to revoke his passport provides a rigid standard that accords national security interests a preferred status over first amendment rights. Such a standard ignores the "chilling" nature of the regulation and gives the State Department the "green light" to revoke passports whenever it believes national security is threatened. This approval of the broad discretionary authority of the Secretary to revoke passports reduces the amount of constitutional protection accorded the right to travel.

To better protect this right, the Court should have utilized a flexible standard weighing the government's interest in protecting national security, the manner government seeks to achieve this goal, and the first amendment rights involved. There should be no presumption favoring government action.

In brief, the *Agee* decision results in an expansion of the Executive's discretion to revoke passports and obstensibly reflects a current trend toward strengthening national security.[166] Consequently, the Court's decision provides a setback in the area of protecting fundamental rights.

Joan R. M. Bullock

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165. Haig v. Agee, 453 U.S. 306.

166. Upon passing H.R. 4, making disclosure of secret agent identities a crime, (*see supra* text accompanying note 144), Representative John Ashbrook of Ohio said:

> We went through the mood of the 60's, when we were attacking the C.I.A. Now there's a realization that the C.I.A. is on our side, that we need good intelligence. There's a strong feeling about the necessity of our having a strong intelligence operation that is hampered to the least extent possible.

N.Y. Times, Sept. 24, 1981, at A15, col. 1. Representative Don Edwards of California added that "The pendulum has gone the other way. Congress wants to unleash the C.I.A., and the F.B.I., too." *Id.* at col. 6.